Supreme Court of the United States.

OCTOBER TERM, 1903.

44 and 45.

HOWARD ET AL. *vs.* NORTH CAROLINA

AND

HOWARD ET AL. *vs.* FLEMING, ETC.

Reply Brief of Plaintiffs in Error and Appellants.

MAY IT PLEASE THE COURT: We submit that defendant and appellee have not touched our main contentions.

We do not insist on the errors assigned as to the grand and petit juries, and this disposes of just half of the briefs in answer to ours.

COUNSEL ASK: "CAN THIS PROCEEDING BE MAINTAINED?"

We answer, most certainly; and confidently refer to the case cited by themselves, namely, Davis *vs.* Burke, 179 U. S. 399.

Second Error Assigned.

Appellee and defendant in error are wrong as to their presumption that "this is a mere repetition of the first assignment of error." We are not here objecting "to the finding of facts by the State courts." Our objection is that the indictment stating no crime is not due process of law. It is not claimed that the court's action below is "an erroneous ruling on a defective indictment," but that there is in this

case no indictment at all; the paper called an indictment might as well have been blank.

Is this due process of law?

There is no question here as between an indictment and an information; and counsels' suggestion on that point is irrelevant.

Finally, counsel state under this head that "the question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question."

We beg to differ with counsel on this statement. An indictment which charges no offense and upon which a citizen of the United States is convicted certainly is not due process of law.

The following are the cases cited by defendant and appellee to sustain their contention:

Caldwell *vs.* Texas, 137 U. S., 692.

On an indictment for murder under the Texas statute the charge was that with force of arms in a certain county in the State of Texas the defendant unlawfully and with express malice aforethought killed the deceased by shooting him with a gun.

The Federal question was not raised until the motion for rehearing in the Court of Appeals, which motion set out that the indictment did not contain a valid charge of murder under the Fourteenth Amendment. The motion was overruled.

This court held on a writ of error that the construction by the Court of Appeals of Texas of its statutes and the sufficiency of the indictment thereunder presented nothing "special, partial, or arbitrary, or in violation of fundamental principles."

The writ was dismissed.

Davis *vs.* Tex., 139 U. S. 651:

Plaintiff in error was indicted for murder in the same language used in the Caldwell case above.

The Caldwell case was affirmed as to the sufficiency of the indictment, and it was also ruled that the refusal of the trial court to continue the cause presented no Federal question.

In this case it was also ruled that the Federal question can not be raised for the first time in this court.

In the opinion in this court the language of the Texas Court of Appeals is quoted with approval, in which it is stated that the omission of the trial judge to charge the jury as to the second degree of murder is not error unless counsel pray such charge and the prayer is refused. The fair implication from the opinion of this court is that had the trial court so refused to charge and a proper objection made in the Texas court, such refusal would be violation of our Fourteenth Amendment, and this court would have reversed the case on error.

If we are right in this deduction, then it must necessarily follow that the refusal of the North Carolina court to charge on the presumption of innocence when and as requested, was within the inhibition of the Fourteenth Amendment.

In O'Neil *vs.* Vermont, 144 U. S. 323, it was ruled among other points that because the plaintiff in error did not present his Federal question below it was too late to present it in this court.

Mr. Justice Field and Mr. Justice Brewer dissented on the ground that while the Federal question was not specifically and by name raised below, nevertheless it necessarily appeared from the facts themselves as being an interstate commerce question.

The implication from the entire case is that had the Federal question been raised, the case would have been reversed because of the barbarity of the punishment (see page 339).

In respect of the punishment it is quite on all fours with the case at bar.

Bergemann *vs.* Backer, 157 U. S. 656, is not in point.

Third Assignment of Error.

Counsel state this assignment to be on the refusal of the trial judge to charge on the presumption of innocence, and insist that the court's charge on reasonable doubt covers the presumption.

It is sufficient to say that this court has ruled in the cases cited in our opening brief that the two are not interchangeable terms, and that the presumption is not once mentioned in the charge. We requested the charge, excepted to its refusal, and presented it below and now present it as a denial of a fundamental right of defendants below, and hence a Federal question.

Fourth Assignment of Error.

This assignment is on the severity of the sentence.

Counsel say there is no fact in the record to support this contention.

It is stated in the petition for the writ and emphasized in the traverse to the return that this sentence was far harsher than any ever inflicted for the like offense in North Carolina. The case went to the court on what was equivalent to a demurrer to the traverse, whereby the allegations stand admitted.

Moreover, we have produced and cited in our opening brief every case of the Supreme Court of North Carolinia in which the punishment for a conspiracy has been set out. These citations amply sustain our contention.

Next counsel contend that the Mallet case, 125 N. C., forecloses defendants below as to the construction of section 1097 of the North Carolina Code. We contend that that section has nothing to do with this offense; which, if an offense at all, is a common law misdemeanor punishable only by fine and jail sentence.

If our contention here be true, then the case of In re Bonner, 151 U. S. 242, is in point.

Counsel further say that the punishment is not cruel nor

unusual as a Federal constitutional question, and cite O'Neil *vs.* Vermont.

We submit that if the sentence is cruel or unusual, under State *vs.* Driver, 78 N. C. 423, then defendants below did not have the equal protection of the law.

Finally, under this head counsel make us say the punishment is violative of the Eighth Amendment. We make no such contention.

We do contend, however, that there is an unwritten law of these United States which forbids any State to inflict an inhuman, barbarous, cruel, or unusual punishment on any citizen of the United States.

For example, suppose the State of North Carolina should attempt to revive the horrid punishment anciently used in England for high treason; would this court permit its execution on a citizen of the United States?

Listen to its terms: In Twyn's case, 6 How. St. Tr. 514, a printer who published a book containing doctrines less violent than certain statements recently printed in Nebraska, was indicted for high treason and found guilty. His sentence was (p. 535) by Ch. J. Hyde:

> "That you be led back to the place from whence you came, and from thence to be drawn upon a hurdle to the place of execution, and there you shall be hanged by the neck, and, being alive, shall be cut down, and your privy members shall be cut off, your entrails shall be taken out of your body, and, you living, the same to be burnt before your eyes; your head to be cut off, your body to be divided into four quarters, and your head and quarters to be disposed of at the pleasure of the King's majesty. AND THE LORD HAVE MERCY UPON YOUR SOUL."

Fifth Assignment of Error.

Appellee and defendant under this head contend that the decision of the State court as to whether or not a certain act is a crime in the State is conclusive upon this

court. We submit that this court has never decided the question as broadly as claimed. On the contrary, the court has gone quite in the other direction. In *ex parte* Virginia, 100 U. S. 339, it was held the inhibition of the Fourteenth Amendment applied to all the State instrumentalities of government. In Siebold's case, 100 U. S. 371, it was held on *habeas corpus* that an act of Congress was void, and Bushell's case, 6 Howell's St. Trial, 999, was expressly approved.

The reasoning, in the opinion by Mr. Justice Bradley, applies as well to State as to United States statutes, and it is a logical conclusion that if punishment had been awarded by a State court under a statute clearly void, this court would discharge the prisoner even though the State courts had held the statute valid. *A fortiori* then should this court overturn a wrong decision on a question of a common law crime by the State tribunal.

In ex parte Medley, 134 U. S. 160, on original petition for habeas corpus, this court discharged the petitioner convicted of murder in a State court on the ground that the State statute was *ex post facto* and void.

This construction of the statute was directly opposite to the construction put thereon by the State courts.

The decision was followed and another convicted murderer discharged in Savage's case, 134 U. S. 176.

If this court, then, will on habeas corpus construe a State statute in a manner opposed to the interpretation of the State courts, how much more should it overthrow an erroneous decision of the State courts on a question of a common law crime?

The quotation by counsel from the Caldwell case is, we take it, not a happy one; for in his opinion the learned chief justice expressly says that this court may interfere where the Fourteenth Amendment has been violated, and in cases where the form of indictment is obviously violative of a citizen's fundamental rights.

"Other Questions."

Under this head counsel discuss very briefly the following questions:

1. The question of the highway act. It is stated the statute directly "gives the judge discretion as to the place of inprisonment."

We do not concede the proposition for a moment.

Defendants below, as we have shown in our opening brief, could not have been sentenced under either section 1096 or 1097 of the Code, pp. 29 and 30 Trans. (No. 44). The offence with which they were charged was neither a felony nor a statutory misdemeanor, and hence the sentence should have been the punishment prescribed by the common law—jail imprisonment or fine, or both. Such sentence necessarily brings them within the provision of class 1, section 1, of the road act, brief, page 20, Trans. (No. 44), page 30, which leaves the court absolutely without discretion.

It will be observed that a somewhat ingenious plan was devised to uphold the penitentiary sentence.

The indictment in each count charges the conspiracy to have been "felonious." At page 11 of defendants' brief in No. 45, will be found the statute defining felonies and misdemeanors; the former being crimes punishable by death or the penitentiary, the latter all other crimes. By no possible construction can the offense here sought to be charged be deemed a felony, *yet these men are in the penitentiary!*

2. Counsel state that we object for misjoinder of counts. We never have made such objection.

3. Counsel refer to our complaint of the increase of punishment because "of the previous history of defendants," which the "judge heard," and cite in support of the sentence the Wilson case in 121 N. C. 654.

If it be the law, as we concede it to be, that the judge in that State may enhance the punishment because of the previous bad record of the defendant, we insist that such record

must be judicially ascertained in accordance with the statute. The statute is as follows:

INDICTMENT FOR SECOND OFFENSE, HOW FIRST CONVICTION TO BE STATED.—Sec 1187, Code 1883.

In any indictment for an offense which on the second conviction thereof is punished with other or greater punishment than on the first conviction, it shall be sufficient to state that the offender was, at a certain time and place, convicted thereof without otherwise describing the previous offense, and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

It will not be contended by counsel for appellee that the statute was followed in the case at bar. The record does not show it, and, *in fact*, no such attempt was made; nor was any allegation touching the matter made in the indictment.

We have treated the matter in our opening brief, page 22.

We have, as we believe, covered the several points in the briefs of opposing counsel. There remains only this broad proposition:

If the courts of North Carolina have discriminated against appellants, if the indictment and conviction are not due process of law, if their fundamental rights as American citizens have been invaded, they look to this court for relief.

If an American citizen can be tried, convicted, and sentenced upon an indictment which is, legally speaking, a blank sheet of paper; if upon such conviction he may be sentenced to a punishment grotesquely enormous; if such sentence is in the face of State statutes, so plain that no layman could misread them; if he may lawfully be denied the presumption of innocence; if in his case the commonest and plainest rules of evidence may contemptuously be disregarded; if the court may single out the complaining witness, confessedly a conspirator for lucre and gain, as a special subject for commendation to the jury; if the State

court may disregard the plain mandatory statute requiring a road sentence for a common law misdemeanor; if the court may listen to gossip *dehors* the record to increase the punishment; if in a conspiracy the court may award varying punishments to the equally guilty conspirators; if the court may award against citizens of other States a sentence for a bare unexecuted conspiracy to defraud five times heavier than an executed conspiracy to debauch and prostitute a seventeen-year old girl; if a State court may impose a penalty twenty times heavier for such unexecuted conspiracy than the minimum for the willful castration of a male human being; if the State court may sentence to a heavier penalty such a bare unexecuted conspiracy than the conspirators in a case to charge and indict a woman with infanticide, and under such circumstances the Federal questions being duly raised United States courts can give no relief, then, indeed, is the Fourteenth Amendment a failure.

The Federal Question.

Opposing counsel rely entirely on the strictly technical proposition that no Federal question is presented in these cases. They do not touch upon the merits.

In addition to the cases elsewhere cited by us, we beg the attention of the court to the following:

In Green Bay *vs.* Patten Paper Co., 172 U. S. 58, 67, it is said that "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted."

In Dewey *vs.* Des Moines, 173 U. S. 193, 199, the point is again ruled; and the court adds that it is only necessary "which at least would call its (the State court) attention to the Federal question as one that was relied on. . . ."

All of which is respectfully submitted.

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